Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

JON-MARC DOBRIN, A PROFESSIONAL CORPORATION, individually and as the assignee of JAMES W. COULTER, Chapter 11 Trustee for GENTE UNIDA, INC., WESTERN REALTY, GLOVER RUSSELL COGAR, JR., THE COGAR FAMILY TRUST and SUNSHINE DIVERSIFIED, INC.,

Petitioner,

versus

STATE FARM FIRE & CASUALTY COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WAS IT ERROR FOR THE DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEAL TO APPLY THE FEDERAL *RES JUDICATA* STATUTE IN A DIVERSITY OF CITIZENSHIP ACTION TO BAR THE PETITIONER'S RIGHT TO AN ON-GOING DUTY TO DEFEND FROM THE INSURER DEFENDANT, WHEN THE DUTY WOULD EXIST UNDER CALIFORNIA'S INSURANCE LAW AND THE FEDERAL "LAST IN TIME" RES JUDICATA RULE?

II. UNDER THE CONSTITUTIONAL PROVISIONS FOR FULL FAITH AND CREDIT, MUST STATE *INSURANCE JURISPRUDENCE* ON THE ON-GOING DUTY TO DEFEND SUPERCEDE FEDERAL *RES JUDICATA* JURISPRUDENCE IN DIVERSITY OF CITIZENSHIP COVERAGE ACTIONS AND THEREFORE BE FOLLOWED BY THE U.S. DISTRICT COURTS AND CIRCUIT COURTS OF APPEAL? 28 U.S.C. 1783, Const. Art. 4, § 1.

III. DOES THE FULL FAITH AND CREDIT ACT [20 U.S.C. § 1738] REQUIRE FEDERAL COURTS TO GIVE PRECLUSIVE EFFECT TO STATE INSURANCE JURISPRUDENCE AND STATE JUDGMENTS THAT MAY TRIGGER DUTIES TO DEFEND UNDER A LIABILITY POLICY?

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ORDERS AND MEMORANDA BELOW

The March 20 , 2001 ORDER of the United States Court of Appeals for the Ninth Circuit in the appeal denying Petitioner's Petition for rehearing and rejecting Petitioner's petition for rehearing en banc in the matter of *JON-MARC DOBRIN, a professional corporation, individually and as the assignee of JAMES W. COULTER, Chapter 11 trustee for GENTE UNIDA, INC., WESTERN REALTY, GLOVER RUSSELL COGAR, JR., the COGAR FAMILY TRUST and SUNSHINE DIVERSIFIED, INC., Plaintiffs and Appellants v. STATE FARM FIRE & CASUALTY COMPANY, Defendant and Appellant*, Appeal No. No. 99-55300 is set forth in the Appendix hereto (App. 1a).

The February 6, 2001 MEMORANDUM of the United States Court of Appeals for the Ninth Circuit in the appeal affirming the judgment of the United States District Court for the Central District of California in the matter of *JON-MARC DOBRIN, a professional corporation, individually and as the assignee of JAMES W. COULTER, Chapter 11 trustee for GENTE UNIDA, INC., WESTERN REALTY, GLOVER RUSSELL COGAR, JR., the COGAR*

FAMILY TRUST and SUNSHINE DIVERSIFIED, INC., Plaintiffs and Appellants v. STATE FARM FIRE & CASUALTY COMPANY, Defendant and Appellant, Appeal . No. 99-55300 is set forth in the Appendix hereto (App. 3a).

The December 3, 1998 ORDER of the United States District Court for the Central District of California granting Respondent's Motion for Summary Judgment and Denying Plaintiff's Motion for Reconsideration and Plaintiff's Motion for Summary Judgment in the matter of *JON-MARC DOBRIN, a professional corporation, individually and as the assignee of JAMES W. COULTER, Chapter 11 trustee for GENTE UNIDA, INC., WESTERN REALTY, GLOVER RUSSELL COGAR, JR., the COGAR FAMILY TRUST and SUNSHINE DIVERSIFIED, INC., Plaintiffs and Appellants v. STATE FARM FIRE & CASUALTY COMPANY, Defendant and Appellant*, Case No. 97-9015 CMB (Mcx), the Honorable Consuelo B. Marshall, Judge, is set forth in the Appendix hereto (App. 4a).

The May 18, 2001 ORDER of the United States District Court for the Central District of California Re: Defendant's Motion for Partial Dismissal for Failure to State a Claim 12(b) (6) in the matter of *JON-MARC DOBRIN, a professional corporation, individually and as the assignee of JAMES W. COULTER, Chapter 11 trustee for GENTE UNIDA, INC., WESTERN REALTY, GLOVER RUSSELL COGAR, JR., the COGAR FAMILY TRUST and SUNSHINE DIVERSIFIED, INC., Plaintiffs and Appellants v. STATE FARM FIRE & CASUALTY COMPANY, Defendant and Appellant*, Case No. 97-9015 CMB (Mcx), the Honorable Consuelo B. Marshall, Judge, is set forth in the Appendix hereto (App. 13a).

The May 9, 1996 FINDINGS OF FACT AND CONCLUSIONS OF LAW of the United States District Court for the Central District of California regarding the Plaintiff's motion for summary judgment in the matter of *BELKIS CASAS, Plaintiff v. STATE FARM FIRE AND CASUALTY COMPANY, an Illinois Corporation, Defendant*, Case No. CV 95-4432-CBM , the Honorable Consuelo B. Marshall, Judge, is set forth in the Appendix hereto (App. 20a).

The January 15, 1995 MEMORANDUM of the United States Court of Appeals for the Ninth Circuit in the appeal affirming the judgment of the United States District Court for the Northern District of California in the matter of *JAMES W. COULTER, Chapter 11 trustee for GENTE UNIDA, INC., WESTERN REALTY, GLOVER RUSSELL COGAR, JR., the COGAR FAMILY TRUST and SUNSHINE DIVERSIFIED, INC., Plaintiffs and Appellants v. STATE FARM FIRE & CASUALTY COMPANY, Defendant and Appellant*, Appeal No. 93-16203 is set forth in the Appendix hereto (App. 26a).

The March 15, 1993 ORDER RE MOTION FOR PARTIAL SUMMARY JUDGMENT of the United States District Court for the Northern District of California in *G. RUSSELL COGAR, individually and as trustee of the COGAR FAMILY TRUST DATED 1983, and as successor in interest of ELIZABETH J. COGAR (deceased), Plaintiff, v. STATE FARM FIRE AND CASUALTY COMPANY*, No. C 92-3701 SC, the Honorable Samuel Conti, Judge, is set forth in the Appendix hereto (App. 30a).

BASIS FOR JURISDICTION

The jurisdiction of the District Court was based on diversity of citizenship.

The MEMORANDUM of the United States Court of Appeals for the Ninth Circuit affirming the decision of the District Court of the Central District of California was filed on February 6, 2001. Petitioner filed a timely petition for rehearing and request for rehearing en banc. The Court denied this application in an ORDER dated March 20, 2001. This petition for writ of certiorari is filed within ninety (90) days from the date of that ORDER. 28 U.S.C. § 2101 (c); Federal Rules of Appellate Procedure for the Ninth Circuit, Rules 35, 41 (d).

The jurisdiction of this Court is invoked pursuant to the provisions of 20 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. IV, § 1:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

11 U.S.C. § 541:

> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case. (2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is - (A) under the sole, equal, or joint management and control of the debtor; or (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable. (3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title. (4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section

510(c) or 551 of this title. (5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date - (A) by bequest, devise, or inheritance; (B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or (C) as a beneficiary of a life insurance policy or of a death benefit plan. (6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case. (7) Any interest in property that the estate acquires after the commencement of the case. (b) Property of the estate does not include - (1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor; (2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case; (3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution; (4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that -

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and (ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this title; or (B)(i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not participate in the operation of the property from which such production payment is transferred; and (ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 542 of this title; or (5) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made - (A) on or after the date that is 14 days prior to the date on which the petition is filed; and (B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition. Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement. (c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection

(a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law - (A) that restricts or conditions transfer of such interest by the debtor; or (B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property. (2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title. (d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

28 U.S.C. § 1738 (1982):

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

> The records and judicial proceedings of any Court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the Court annexed, if a seal exists, together with a certificate of a judge of the Court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every Court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Federal Rules of Civil Procedure, Rule 12(b)(6):

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . .(6) failure to state a claim upon which relief can be granted . . .. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in

law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 , and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Federal Rules of Appellate Procedure, Rule 35. EN BANC DETERMINATION:

(a) **When Hearing or Rehearing En Bank May Be Ordered.** A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the Court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the Court's decisions; or

(2) the proceeding involves a question of exceptional importance.

(b) **Petition for Hearing or Rehearing En Banc.** A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

> (A) the panel decision conflicts with a decision of the United States Supreme Court or of the Court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions; or
>
> (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.
>
> (2) Except by the Court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding material not counted under Rule 32.
>
> . . .

California Civil Code § 1641:

> The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.

California Civil Code § 3333:

> For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

California Code of Civil Procedure § 1008:

> (a) When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown.
>
> (b) A party who originally made an application for an order which was refused in whole or part, or granted conditionally or on terms, may make a subsequent application for the same order upon new or different facts, circumstances, or law, in which case it shall be shown by affidavit what application

was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. For a failure to comply with this subdivision, any order made on a subsequent application may be revoked or set aside on ex parte motion.

(c) If a court at any time determines that there has been a change of law that warrants it to reconsider a prior order it entered, it may do so on its own motion and enter a different order.

(d) A violation of this section may be punished as a contempt and with sanctions as allowed by Section 128.7. In addition, an order made contrary to this section may be revoked by the judge or commissioner who made it, or vacated by a judge of the court in which the action or proceeding is pending.

(e) This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section.

(f) For the purposes of this section, an alleged new or different law shall not include a later enacted statute without a retroactive application.

(g) This section applies to all applications for interim orders.

California Code of Civ. Pro. § 1860:

For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the Judge be placed in the position of those whose language he is to interpret.

STATEMENT OF THE CASE

A. *The Issues of the Petition.*

Intervention by this Court is important because, increasingly, Federal District Court diversity actions, such as this one, arise out of coverage disputes with respect to an insurer's duty to defend an insured sued in an underlying State Court action, who is citizen of a different state than the insurer. When the insured brings a State Court action against the insurer, the insurer routinely removes the action to federal court in hopes of gaining a strategic advantage. Resolution of coverage disputes in Federal District Court diversity actions can become problematic because the application of Federal res judicata rules might be used to bar an insurer's on-going duty to defend required under the insurance law of the underlying State Court Action. This could occur, as it did in this case, where a Federal District Court determined that there was no duty to defend a complaint, before allegations were subsequently added to an amended complaint detailing new facts and circumstances which required the insurer to defend under the applicable state insurance law.

Petitioner herein respectfully requests this Court to promulgate a uniform rule for the application of the doctrine of *res judicata* by Federal District Courts so that state insurance law is not usurped in this unique area of an insurer's on-going duty to defend an insured. In cases, such as this one, state insurance law should prevail where an insurer has an on-going duty to investigate and defend subsequently amended complaints, when new allegations new facts, new circumstances and changes in insurance law have occurred, even after the insurer has obtained a prior

Federal Court judgment of no duty to defend on a initial complaint. It should be noted that under California law the filing of an amended complaint renders the prior complaint moot.

In this case, the U.S. District Court for the Northern District of California (the "Northern District") ruled an insurer (State Farm) had no duty to defend one of its insureds, a real estate broker, under a liability policy based solely on a second amended complaint in the underlying State Court action. After the Northern District's judgment was entered on the second amended complaint, a third amended complaint was filed in the State Court action against the insured-broker and his employee, a real estate licensee agent. The amended complaint included allegations that were not in the original complaint.

The litigation forced insured-broker to file for bankruptcy. The bankruptcy trustee took over the insured-broker's appeal of the Northern District's judgment. The Ninth Circuit affirmed the Northern District's ruling that State Farm had no duty to defend the second amended complaint.

Subsequently, an employee of the insured-broker, who was not a party to the Northern District Court action, filed a new diversity action, in the U.S. District Court for the Central District of California (the "Central District") against the same insurer (State Farm) under the same policy and alleged a right to a defense of the third amended complaint filed in the State Court action. State Farm argued that the employee of the insured-broker was not an insured and further argued that even if she were an insured, her claim would be barred by federal res judicata or collateral estoppel rules as a result of the Northern District's judgment. The Central District found that the employee was also an insured

under the State Farm policy and that the allegations of the third amended complaint triggered State Farm's duty to defend under the policy.

Petitioner seeks a clear directive by this Court to Federal District Courts that the Full Faith and Credit Act mandates that the orders of a California Superior Court be considered dispositive for purposes of coverage disputes and the determination of a duty to defend. Since the third amended complaint alleged respondeat superior liability for the insured broker arising from the allegations against the employee, and since these allegations triggered State Farm's duty to defend the employee, said allegations must also have triggered the duty to defend the insured employer. It was clear error for the Ninth Circuit to hold that the Northern District's judgment, arising from a now moot Second Amended complaint, mandated a different result. The Ninth Circuit ignored federal "last in time" res judicata rules with regard to the Central District's decision and California substantive law concerning an insurer's on-going duty to defend.

New parties may be joined as Defendants who are employees or agents of the original Defendants. As such, Federal District Courts may be called upon to issue more than one judgment based upon such changing facts and new parties. Often these new Defendants are subordinates or agents of the original Defendant/insureds, with their own rights to a defense under a liability policy, and the original Defendant/insureds are liable for the new charges against their subordinates under the rule of *respondeat Superior*. Likewise, the State Court may issue orders which are dispositive determinations of whether one or more party has a right to defense under the terms of a liability policy.

Thus, one District Court may determine that a

primary insured is not entitled to a defense based upon earlier third party allegations, while a second District Court may subsequently determine that a later joined primary insured's employee is entitled to such a defense based on later amendments to the complaint in the third party case. The primary insureds should be entitled to a defense to the same extent as his or her employee or agent if *respondeat Superior* liability is alleged against the primary insureds. In California, insurers have an ongoing duty to investigate when claims are tendered. Thus, if the primary insureds ask their carrier to reconsider a denial of defense based on *respondeat Superior* liability for insured employees who have been found by a District Court to be entitled to a defense, may the insurer claim that the first District Court ruling is binding for all time and coverage is forever denied, or are the primary insureds entitled to the benefit of the subsequent judgment which finds a duty to defend for their subordinates? In other words, how is the doctrine of *res judicata* to be applied when a District Court issues a judgment of no coverage for the primary insured, but a second District Court finds that a subsequent amended complaint imposes upon the same carrier a duty to defend the primary insured's employee or agent, for whom the primary insured is liable? May the primary insured also take the benefit of the second District Court judgment, or is the initial judgment based on the earlier allegations forever binding, regardless of whether new facts warrant imposition of a duty to defend?

In the absence of a clear direction from this Court uncertainty exists as to which judgment has binding force and effect. Petitioner urges that this problem is one of growing national importance and, until resolved, litigants are being denied the certainty to which they are entitled.

B. *The Underlying Facts*

This instant petition stems from a Central District Court ORDER which gave *res judicata* effect to an earlier ruling by the Northern District Court in a related matter involving the insureds, rejecting such effect to a later ruling by the Central District Court. In so doing, the Central District Court failed to give the California rule concerning *res judicata* the Full Faith and Credit to which it was entitled. In its February 9, 2001 MEMORANDUM, the Ninth Circuit affirmed the December 2, 1998 ORDER of the District Court on a question of *res judicata* which runs contrary to California substantive law, including that State's insurance law, as interpreted by this Court and the California Supreme Court, and contrary to the Ninth Circuit's own precedents that in multiple *res judicata* situations, **"a third Court should give *res judicata* effect to the *last* previous judgment entered."** *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F2d 1524, 1530 (9th Cir. 1985). The underlying facts are set forth below:

Petitioner JON-MARC DOBRIN, A PROFESSIONAL CORPORATION ("JMD"), is the assignee of JAMES W. COULTER, the Chapter 11 Trustee, for GENTE UNIDA, INC., WESTERN REALTY, GLOVER RUSSELL COGAR, JR., THE COGAR FAMILY TRUST and SUNSHINE DIVERSIFIED, INC. (collectively, the "Cogar Entities"). JMD previously represented the Cogar Entities until their bankruptcy filing. JMD had a claim against the bankruptcy estate and the trustee assigned the estate's rights against State Farm to JMD as part of a settlement of the JMD claim.

The Cogar Entities were all insureds of Respondent STATE FARM FIRE & CAS. CO. ("State Farm"). The

underlying litigation is a coverage action. The facts are complex because they involve certain rulings in several previous Court cases, one in the California Superior Court and two that involve different District Courts: (1). *Hoktiongtjoa v. Cogar, et al.*, Los Angeles Superior Court Case No. BC 025932 [the "*Hoktiongtjoa* action"]; (2). *Belkis Casas v. State Farm Fire and Casualty Company*, U.S. District Court, Central District of California, Case No. CV 95-0858-CBM (MCx) [the "*Casas* action"]; (3). *G. Russell Cogar v. State Farm Fire and Casualty Company*, U.S. District Court, Northern District of California, Case No. C92-3710-SC [the "Cogar Coverage Action"]; and (4). *In re G. Russell Cogar, Jr., The Cogar Family Trust, Sunshine Diversified, Inc., and Gente Unida Inc. dba Western Realty*, United States Bankruptcy Court, Eastern District of California, Case No. 93-27880-A-11 [the "Cogar Bankruptcy Action"].

The claim against State Farm arose from that carrier's failure to defend the Cogar Entities against the claims asserted in the *Hoktiongtjoa* Action. The *Hoktiongtjoa* Action was related to the sale of several properties through the listing brokerage, Western Realty, from Hoktiongtjoa to Cogar. Therein, Plaintiff Ben Hoktiongtjoa filed various claims against G. Russell Cogar (Cogar), a real estate broker, and the brokerage (Gente Unida, Inc. dba Western Realty [a corporation in which Cogar was a minority shareholder at the time]) and Sunshine Diversified, Inc. (which managed some of Cogar's properties).

While the *Hoktiongtjoa* Action was in progress, Cogar and the Cogar Family Trust (the "Trust") filed a coverage action in the U.S. District Court for the Northern District of California (the "Cogar Coverage Action") based upon Hoktiongtjoa's *Second* Amended Complaint. Based

solely upon Hoktiongtjoa's Second Amended Complaint, and solely upon the allegations brought against Cogar and the Trust, the Northern District granted a motion for summary judgment brought by State Farm [Order filed **March 15, 1993**]. The matter was appealed to the Ninth Circuit, but while the appeal was pending, the Cogar Bankruptcy Action was filed. The bankruptcy trustee received relief from stay to continue the appeal. Ultimately, the Ninth Circuit affirmed the Northern District's ruling on the appeal by the Trustee .

Subsequent to the District Court's ruling in the Cogar Coverage Action in the Northern District, Hoktiongtjoa filed a ***Third*** Amended Complaint in the Los Angeles Superior Court [Hoktiongtjoa's Third Amended Complaint is dated **March 24, 1993**]). Subsequent to the Cogar Coverage Action, Belkis Casas, another Defendant in the *Hoktiongtjoa* Action and a real estate agent at Western Realty, filed a coverage action against State Farm in the U.S. District Court for the Central District of California (the "*Casas* Action). The Central District held that State Farm had a duty to defend Casas against the allegations in the Third Amended complaint filed in the *Hoktiongtjoa* Action.

Pursuant to 11 USC 541, any claims the Cogar Entities had against State Farm, including choses in action, became property of the bankruptcy estate. As such, the claim of Plaintiff, as assignee of the rights of Cogar Entities, is for any and all damage claims against State Farm based on the carrier's duty to defend the Cogar entities. The damage claims against Casas were asserted by Hoktiongtjoa against Cogar and Western Realty on a *respondeat Superior* basis based upon (1) the broker-agent relationship or (2) the employer-employee relationship between Cogar and Western Realty on the one hand, and Casas on the other hand.

Thus, in the Central District Court, Petitioner asserted

that the damage claims asserted against the Cogar Entities, via Casas, on a *respondeat Superior* theory, must also trigger State Farm's duty to defend because these claims are the exact same claims which triggered the duty to defend against Casas. The Central District, in the *Casas* Action, had already found that these claims were not included in the Cogar Coverage Action [a ruling binding on State Farm, which was a party to the *Casas* Action]. Even so, in the instant case, the Central District first granted State Farm's motion to dismiss any claims related to Cogar and the Cogar Family Trust, ruling that as to these parties all claims arose out of the same transactional nucleus of facts as the Cogar Coverage Action Despite this finding, the Central District also specifically held that the fiduciary duty claims against Casas were not included in the Cogar Action. Oddly, the Court did not address the *respondeat Superior* argument involving these different claims which arose in the Third Amended Complaint filed in the underlying action *subsequent* to the Northern District's ruling in the Cogar Coverage Action. Thereafter, the Central District granted State Farm's motion for summary judgment and denied JMD's motion for partial summary judgment on the issue of duty to defend.

An appeal followed. In its February 6, 2001 MEMORANDUM the Ninth Circuit Court of Appeals affirmed the District's Court's finding made in its May 18 and December 3, 1998 orders that *res judicata* bars the instant action. In so ruling, the Court rejected Petitioner's contention that a recent change in the controlling principles of law supporting the original judgment precludes the application of *res judicata*. Petitioner applied for rehearing, which Petition was denied in the Court's ORDER of March 20, 2001.

REASONS FOR GRANTING THE WRIT

I. THERE IS A NATIONAL NEED FOR UNIFORMITY OF DECISION TO PREVENT MISAPPLICATION OF *RES JUDICATA* RULES, INCLUDING THE "LAST IN TIME" RULE, IN COVERAGE LITIGATION.

Each of the four underlying actions that affect the case at bar went to final judgments. *Res judicata* applies to all of these actions. It would have appeared that the Ninth Circuit has delineated the proper method for *res judicata* analysis when there are conflicting decisions from different courts. The Ninth Circuit Court of Appeals' ruling in *Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F2d 1524 (9th Cir. 1985) first defines *res judicata*, then discusses the breadth of the doctrine, and finally enumerates the proper application of the doctrine to multiple conflicting decisions from several courts:

> *Res judicata* encompasses two subsidiary doctrines, claim preclusion and issue preclusion. Under claim preclusion, a final judgment on the merits of a claim bars subsequent litigation of that claim. Claim preclusion "prevents litigation of all grounds for, or defenses to, recovery **that were previously available to the parties**, regardless of whether they were asserted or determined in the prior proceeding. . . . The related doctrine of issue preclusion, or collateral estoppel, bars relitigation, even in an action on a different claim, of **all issues of**

fact or law that were actually litigated and necessarily decided in the prior proceeding.

The principles of *res judicata* apply not only to successive Federal Courts . . . but also, by virtue of the Full Faith and Credit clause of the United States Constitution, to actions in the state courts of different states. *See* U.S. Const. Art. IV, § 1 . . . Further, Federal Courts are required by statute to give *res judicata* effect to the judgments of state courts. *See* 28 U.S.C. § 1738 (1982) . . .

When the same claim or issue is litigated in two courts, the second Court to reach judgment should give *res judicata* effect to the judgment of the first, regardless of the order in which the two actions were filed. . . . **Sometimes, however, the second Court does not give preclusive effect to the judgment of the first Court. This can occur when *res judicata* is not asserted in the second Court, or when the second Court decides, rightly or wrongly, that the doctrine does not apply.** Should the claim or issue then come before a third Court, as it did before the Central District in this case, that Court is faced with conflicting judgments from the first two courts. **The governing rule to be applied is quite clear. The third Court should give *res judicata* effect to the *last* previous judgment entered. . . .**

> This is the rule of "last in time." The formal rationale behind the rule is that the implicit or explicit decision of the second Court, to the effect that the first Court's judgment is not *res judicata*, is itself *res judicata* and therefore binding on the third Court. . . . The decision is not binding because it is correct; it is binding because it is last. The rule furthers the purposes of *res judicata* because it end[s] the chain of relitigation . . . by stopping it where it [stands] after entry of the second Court's judgment, and thereby discourages relitigation in a third Court. . . . **If an aggrieved party believes that the second Court erred in not giving *res judicata* effect to the first Court's judgment, then the proper avenue of redress is appeal of the second Court's judgment, not collateral attack in a third Court.**

[*Americana Fabrics*, 754 F2d at 1529-1530, emphasis added, interior citations and quotes omitted]

Thus, the *Americana Fabrics* ruling demonstrates that the *Casas* action must bind State Farm as it ***was* a party in the *Casas* Action**. This Court has itself held that:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and *res judicata*, is that a "right, question or fact distinctly put in issue and directly determined by a Court of competent jurisdiction . . .

> **cannot be disputed in a subsequent suit between the same parties or their privies. . .** ." [citations]

[*Montana v. United States*, 440 US 147; 59 L.Ed.2d 210, 216; 99 S.Ct 970 (1979), citations omitted, emphasis added]

On appeal before the Ninth Circuit, Petitioner argued that State Farm is not entitled to litigate any of items enumerated in paragraph of 3 of its Statement of Issues because these are all coverage issues that were decided in the *Casas* Action. In that action the Central District Court specifically found that:

> . . . CASAS presented facts indicating that the duty to defend was triggered under three separate coverages of the policy: bodily injury, property damage and personal injury. If Hoktiongtjoa prevailed, he would have been entitled to recover for all damage proximately caused by the breach [California Civil Code Section 3333 and *Salahutdin v. Valley of California, Inc.*, 24 Cal.4th 555, 29 Cal. Rptr. 2d 463 (1994)]. Thus, there was a potential that CASAS would be liable for damages arising from Hoktiongtjoa's alleged personal injury, bodily injury and property damage.
>
> Finally, even if CASAS would only face[] a potential of liability for intentional breach of fiduciary duty, State Farm's duty to defend would still have been triggered. As the California Supreme Court recently reaffirmed

> in *Horace Mann Insurance Company v. Barbara B.*, 4 Cal.4th 1076, 1087; 17 Cal. Rptr 2d 210; 846 P.2d 792 (1993): "It is important to remember that no public policy forbids the *defense* of claims alleging intentional acts." CASAS denied having breached any duty to Hoktiongtjoa and, under the policy, she was entitled to a defense of "groundless, false and fraudulent" claims.

[Findings of Fact and Conclusions of Law" in the *Casas* Action, p.30, lines 13-25]

On appeal Petitioner argued that the exact same damage claims that were asserted against CASAS and were found to trigger coverage in the *Casas* Action, were also asserted against Cogar and Gente Unida, Inc. [(dba Western Realty (during the relevant time period)] on a theory of *respondeat Superior* because Casas was an agent and/or employee of these entities. Thus, if there was a duty to defend CASAS against these claims, there was also a duty to defend Cogar and Gente Unida/Western Realty against these claims. The *respondeat Superior* liability of Cogar and Gente Unida/Western Realty is completely separate and independent from any liability they might have individually for any other claims alleged in the Hoktiongtjoa complaint.

State Farm's position was that the Northern District's ruling was correct, and the Central District's ruling was incorrect, and therefore this Court should apply the Northern District's ruling. However, even if this argument was true, State Farm was a Defendant in both actions. Both actions are final judgments not subject to further appeal, and under the "last in time" rule the Central District's judgment in the *Casas* Action is controlling.

In dismissing Petitioner's arguments and this action, the trial Court held that:

> "*Res judicata* is no defense where, between the first and second suits, there has been a change in the law or modification of significant facts creating new legal conditions." [citations] Plaintiffs assert that this Court's finding that Defendant owed a duty to defend Casas in *Casas v. State Farm*, CV95-4432 (CBM), is a significant change in fact creating a new legal condition.
>
> However, this Court's finding in *Casas v. State Farm* does not apply **to Plaintiffs** as they were not a party to that action nor was Casas a party to the Cogar Action. Furthermore, the facts and allegations in *Casas v. State Farm* are different from those in both the Cogar Action and the present action. Hoktiongtjoa's causes of action against Casas were based on the fiduciary duty that Casas, as Hoktiongtjoa's real estate agent, owed to Hoktiongtjoa. Therefore, Hoktiongtjoa's claims against Casas were not dependent upon any contractual arrangement as was the case here and in the Cogar action.
>
> *Res judicata* is appropriate to preclude Plaintiffs' claims [against Cogar and the Cogar Family Trust] in the present action.

[Order Re Defendant's Motion for Partial Dismissal for

Failure to State a Claim 12(b)(6), p.4, line 24-p.5, lines 10 (bold emphasis added)]

The trial Court's error in this instance was failing to realize that the pivotal issue is not whether the ruling in *Casas v. State Farm* applied *to the Plaintiff* in this action, **but whether the ruling *applied to State Farm*.** It is the party **"against whom the plea is asserted" who must be "a party or in privity with a party to the prior adjudication"** for *res judicata* purposes. *Clemmer v. Hartford Insurance Company*, 22 Cal.3d 865, 874; 587 P2d 1098; 151 CalRptr 285 (1978). *Also see Blonder-Tongue v. University Foundation*, 402 US 313, 329 (1962). If the ruling in the *Casas* Action applied to State Farm, which it must have since State Farm was the Defendant, than as soon as the ruling became final it was *res judicata* as to State Farm..

Further, the Ninth Circuit's MEMORANDUM dismissing the appeal was in direct conflict with it's holding in *Americana Fabrics* (*supra*) that a third Court "should give *res judicata* effect to the *last* previous judgment entered" [754 F2d at 1530]. The ruling in the *Casas* Action is dated **May 9, 1996**. The ruling in the Cogar Coverage Action is dated **March 12, 1993**. Thus, even <u>if</u> the ruling in the *Casas* Action directly contradicted the ruling in the Cogar Coverage Action, the ruling in the *Casas* Action would be entitled to *res judicata* effect under the "last in time" rule.

Moreover, the ruling in the *Casas* Action does *not* contradict the ruling in the Cogar Coverage Action. In the Cogar Coverage Action, the Northern District specifically found that Hoktiongtjoa's **Second** Amended Complaint "does not allege anything other than intentional conduct" and that the:

> [C]auses of action are for fraud and breach of contract . . . The Complaint cannot be fairly read to include an allegation that Cogar or anyone employed by him negligently failed to pay the almost $2,000,000 allegedly owed Hoktiongtjoa.

The claims of breach of fiduciary duty that the Central District in the *Casas* Action found alleged against Casas in Hoktiongtjoa's **Third** Amended Complaint constitute separate claims that were not litigated in the Cogar Coverage Action. The Supreme Court has held as follows:

> The basic distinction between the doctrines of *res judicata* and collateral estoppel . . . has frequently been emphasized. Thus, under the doctrine of *res judicata*, a **judgment "on the merits"** in a prior suit involving the same parties or their privies bars a second suit **based on the same cause of action**. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes **relitigation of issues actually litigated and determined in the prior suit**, regardless of whether it was based on the same cause of action as the second suit.

[*Lawlor v. National Screen Service Corp.*, 349 US 322; 99 L.Ed. 1122, 1126-1127; 75 S.Ct. 865 (1954), emphasis added, footnotes omitted]

In *Lawlor*, the Supreme Court reversed the District Court's and the Appellate Court's finding of *res judicata*:

> That both suits involved "essentially the same course of conduct" is not decisive. Such a course of conduct--for example, an abatable nuisance--may frequently give rise to more than a single cause of action. And so it is here. The conduct presently complained of was all subsequent to the 1943 judgment. In addition, there are new antitrust violations alleged here . . . not present in the former action.

[*Lawlor*, 99 L.Ed. at 1127-1128]

The final judgment that State Farm had a duty to defend the damage claims against Casas is a fact occurring subsequent to the judgment in the Cogar Coverage Action. Another fact, not in existence at the time of that ruling, was the motion for summary judgment filed by Hoktiongtjoa in the *Hoktiongtjoa* Action under the Third Amended Complaint. This motion was Ex. 7 to Casas' motion for summary judgment that State Farm had a duty to defend her under Hoktiongtjoa's Third Amended Complaint [*See* Request for Judicial Notice (submitted herewith)]. In this motion Hoktiongtjoa unequivocally requests "Judgment against the Defendants, Cogar, Western Realty and Belkis Casas for breach of Fiduciary Duties." [Hoktiongtjoa notice of motion, p.4, lines 3-4]

In both this action and the *Casas* Action, the Central District found that these claims of breach of fiduciary duty differed from the facts alleged in the Cogar Coverage Action in the Northern District. "A fundamental precept of common-law adjudication, embodied in . . . *res judicata*, is that a "**right, question or fact distinctly put in issue and directly determined** by a Court of competent jurisdiction . .

. **cannot be disputed** in a subsequent suit between the same parties or their privies." [*Montana* (*supra*) 59 L.Ed.2d at 216]. Obviously, the Northern District could not have determined facts that weren't before it. Thus, the Northern District's ruling should not be *res judicata* on the issue before this Court involving the respondeat Superior damage claims related to the *Casas* Action.

Also, one must look to the claims alleged in the complaint and any other information available to the insurer, not merely the causes of action alleged, to determine if a complaint has triggered the duty to defend under a particular policy:

> [I]t is the duty of the insurer to defend the insured when sued in any action **where the facts alleged in the complaint** support a recovery . . . regardless of the fact that the insurer has knowledge that the injury is not in fact covered.

Montrose Chemical Corp. v. Superior Court, 6 Cal.4th 287, 297; 24 CalRptr2d 467; 861 P2d 1153 (1993) (emphasis added)

> If **the claims asserted** in the underlying action raise a potential for coverage, the insurers have a duty to provide a defense...

Haskel, Inc. v. Superior Court, 33 Cal.App.4th 963, 977; 39 CalRptr2d 520 (1995) (italics in original)

Thus, although *res judicata* is sometimes spoken of in terms of **causes of action** (as in *Lawlor*, *supra*), the issues

in this case require a focus on individual **claims**. The question of prior determination of issues is one of collateral estoppel:

> Under collateral estoppel, **once an issue is actually and necessarily determined by a Court of competent jurisdiction**, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.

[*Montana*, *supra*, 59 L.Ed.2d at 217 (emphasis added)]

In the case at bar, collateral estoppel would apply to State Farm, but not to the plaintiffs. The issues involving the tortious damage claims that triggered coverage in the *Casas* Action were not before the Northern District in the Cogar Coverage Action; nor was Casas a party to the Cogar Coverage Action.

Thus, the issues determined in the Cogar Coverage Action were not binding on Casas. However, the issues determined in the *Casas* Action are binding on State Farm. It has been **"actually and necessarily determined by a Court of competent jurisdiction"** that the damage claims asserted against Casas in the Hoktiongtjoa Third Amended Complaint triggered coverage under the State Farm Business policy. This is especially true since the ruling involved interpretation of a contract. *Zdanok v. Glidden Co.*, 327 F2d 944, 953 (1964). State Farm is collaterally estopped from disclaiming those findings.

State Farm asserted collateral estoppel in the case at bar to argue that the Cogar Coverage Action estops the Plaintiff in this action [actually, the Plaintiff's assignors]

from relying on the decision in the *Casas* Action [Resp. Brief, State Farm's Statement of Issues, p.2, para. 1]. Since the claims in the *Casas* action were different from the claims in the Cogar Coverage Action, this is an improper use of collateral estoppel. This Court has held as follows:

> [W]here the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be **as to the point or question actually litigated and determined in the original action**; not what might have been thus litigated and determined. *Only upon such matters is the judgment conclusive in another action.*

Cromwell v. County of Sacramento, 94 US 351, 353; 24 L.Ed. 195, 198 (1976) (emphasis added)

The District Court in this action should have applied the collateral estoppel doctrine to State Farm. State Farm is bound by the final judgments in both the Cogar Coverage Action and the *Casas* Action. The ruling in the *Casas* Action was that, *in the Third Amended Complaint*, (1) Hoktiongtjoa alleged breach of fiduciary duty against Casas, that (2) whether such breach was negligent or intentional

could only be determined from a factual inquiry and not from the allegations of the complaint, and that (3) under Civil Code § 3333 and the *Salahutdin* opinion, Casas was potentially liable for all damages asserted in the *Hoktiongtjoa* complaint, including his claims for bodily injury, property damage and personal injury.

The ruling in the *Casas* Action did not find that the State Farm policies provided coverage for claims involving fraud or breach of contract. There is no contradiction between these two rulings. State Farm is bound by the finding that the CASAS damage claims triggered a duty to defend under the Business policies, and therefore is estopped from denying that these very same claims must have also triggered a duty to defend Cogar, the Trust, and Western Realty:

An insurer's **duty to defend** a claim, which is broader than the duty to indemnify, arises *"[w]henever [the insurer] ascertains facts* which give rise to the potential of liability under the policy." *Gray v. Zurich Ins. Co.*, 65 Cal.2d 263, 276-277; 54 CalRptr 104; 419 P2d 168 (1966) [emphasis added].

If the insurer must provide coverage *whenever* "the claims asserted in the underlying action raise a potential for coverage" the Central District's ruling finding coverage for the damage claims against Casas required State Farm to provide coverage for Cogar and the Trust as the ruling unequivocally "raised a potential for coverage" as to those same claims alleged against Cogar and the Trust.

Thus, the facts of this case demonstrate the inconsistent positions that both the District Court and the Ninth Circuit have taken in applying the doctrines of *collateral estoppel* and *res judicata* to evolving insurance coverage disputes. Clearly, the *Casas* judgment controls,

binds State Farm and should provide a defense to the Cogar Entities under *respondeat Superior*.

II. THERE IS A PRESSING NEED FOR THIS COURT TO GIVE CLEAR DIRECTIONS TO ALL FEDERAL COURTS THAT THEY ARE TO GIVE PRECLUSIVE EFFECT TO STATE COURT JUDGMENTS AND ORDERS IN THIRD PARTY ACTIONS IN DETERMINING DUTY TO DEFEND COVERAGE ACTIONS.

When faced with a State Court judgment relating to an exclusively Federal claim, a Federal Court must first look to the law of the rendering State to ascertain the preclusive effect of the judgment. If State law indicates that a particular claim or issue would be barred from litigation in a Court of that State, then the Federal Court must decide whether, as an exception to the Full Faith and Credit Act, it should refuse to give preclusive effect to a State Court judgment.

In the present action the California doctrine of *respondeat Superior* would, necessarily, require that the Cogar Entities be held liable for the exact same claims as those alleged against Casas in the Hoktiongtjoa third amended complaint. They, therefore, are entitled to a duty to defend on the same bases as Casas. The Los Angeles Superior Court ordered that Belkis Casas was not liable for fraud and this, also, is binding on all parties. Thus, the respondeat Superior liability must also be for non-intentional conduct. Since the Central District Court in the *Casas* action found that this non-intentional conduct was entitled to a defense under the policy, then the Cogar entities, who are separate insureds under the policy, were similarly entitled to this coverage.

The Full Faith and Credit Act (28 U.S.C. § 1738) requires Federal Courts to give preclusive effect to State judgments. It applies even when the State Court judgment at issue incorporates a class action settlement releasing claims solely within the jurisdiction of Federal Courts. It would seem obvious then that State Court doctrines such as *res judicata* become part of national jurisprudence that Federal District Courts must give deference to and apply in the cases before them. See *Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963).

III. IT WAS ERROR FOR THE NINTH CIRCUIT NOT TO FOLLOW THE DECISION OF CALIFORNIA'S HIGHEST COURT THAT THE INSURER MUST DEFEND WHEN THERE IS ANY POSSIBILITY OF COVERAGE WHERE APPLICATION OF THE "LAST IN TIME" RES JUDICATA RULE REQUIRED A FINDING THAT THE CENTRAL DISTRICT'S JUDGMENT THAT STATE FARM HAD A DUTY TO DEFEND THE EMPLOYEE/AGENT OF THE PRIMARY INSURED MANDATED THAT STATE FARM ALSO HAD A DUTY TO DEFEND THE INSURED EMPLOYER/BROKER AGAINST RESPONDEAT SUPERIOR CLAIMS ARISING FROM THE EMPLOYEE/AGENT'S ACTIONS WHICH TRIGGERED COVERAGE

Further confirmation that the Ninth Circuit's ruling in this matter was in error can be ascertained from the ruling in *Liberty Mutual Insurance Company v. Superior Court*, 58 Cal.App.4th 617; 68 Cal.Rptr.2d 219 (1997). In the *Liberty Mutual* case the facts were as follows:

> In a toxic contamination insurance coverage dispute involving numerous sites and insurers, the trial court denied one insurer's motion for summary adjudication of issues as to that insurer's duty to defend. Previously, the insureds had successfully moved for summary adjudication of this very issue, and the insurer had begun paying for the insureds' defense. The insurer made its subsequent motion on the ground that New York law, rather than California law, applied. In denying the insurer's motion, the court found that the insurer's motion was untimely under Code Civ. Proc., 1008, which governs motions for reconsideration.

[*Liberty Mutual*, 58 CA4th at 617]

The Second Appellate District held that under the principles of California Insurance Law enunciated by the California Supreme Court in *Montrose* (supra), it would be unfair to require the moving party (the insurer, in that case) to have to make a showing concerning new facts and law prior to bringing a renewed summary adjudication motion regarding the duty to defend. The court held that under *Montrose*:

> . . . the Supreme Court construed the standard CGL language to require, in effect, that an insured's motion for summary adjudication of duty to defend be granted unless the insurer is able to demonstrate a basis for a summary judgment of no duty to indemnify. In the

> words of Montrose I: "To prevail, the insured must prove the existence of a potential for coverage, while the insurer must establish the absence of any such potential. In other words, the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot. Facts merely tending to show that the claim is not covered, or may not be covered, but [which] are insufficient to eliminate the possibility that resultant damages (or the nature of the action) will fall within the scope of coverage, therefore add no weight to the scales. Any seeming disparity in the respective burdens merely reflects the substantive law." (Montrose I, supra, 6 Cal.4th at p. 300.) **It is therefore the "substantive law" of insurance, as applied to interpretation of the standard CGL language, that controls the type of showing an insured or insurer must make on a duty to defend motion.**

Liberty Mutual, supra, 58 CA4th at 621 (emphasis added)

Citing *Haskel* (supra), the *Liberty Mutual* Court explained:

> Thus the ruling obtained by the insured in this case-that Liberty Mutual has a duty to defend-is not necessarily a permanent determination. It can endure only so long as Liberty Mutual is unable to demonstrate that

there is no possibility of an eventual duty to indemnify. [¶] Haskel explained that this state of law "does not unfairly burden an insurer who disputes coverage," because even though an insured "may obtain an early summary adjudication of a defense obligation, the insurer is entitled to seek a contrary ruling at any time it acquires the requisite evidence to conclusively eliminate any potential for coverage."

[*Liberty Mutual*, 58 CA4th at 622]

The Court went on to state that:

Haskel cannot be interpreted as imposing a requirement that an insurer, on a subsequent motion for summary judgment or adjudication on duty to defend, must establish that the facts on which the motion is based were newly discovered after the insured's earlier motion for summary adjudication on duty to defend. . . [¶] **Since the substantive law of insurance provides that a duty to defend endures only so long as a possibility of duty to indemnify remains alive, the trial court must evaluate duty to defend based upon the showing before the trial court at the time of a particular motion.** A subsequent motion by an insurer might theoretically constitute an impermissible motion for reconsideration, **but only if the factual scenario presented by the insurer in**

> **support of the motion were precisely the same as that presented on the earlier motion.**

[*Liberty Mutual*, 58 CA4th at 622-623]

As to the requirements of California Code of Civil Procedure § 1008, which bars reconsideration of interim rulings until an appeal is taken absent a showing of new facts or law, the *Liberty Mutual* court noted that even if the factual scenario was exactly the same, the trial court would still be able to reconsider the matter:

> Even in this circumstance [that of an identical factual scenario], there is some doubt about whether section 1008 would bar consideration of the motion. If it were demonstrated to a court that an earlier ruling was erroneous, it is doubtful that the Legislature could nevertheless require continued litigation on the basis of the prior erroneous ruling. This issue is not presently before us and we comment on it only to avoid any appearance of implied ruling.

[*Liberty Mutual*, 58 CA4th at 623, fn.3]

As to the matter before this Court, it is important to note that the *Liberty Mutual* court held that **the "substantive law" of insurance "controls the type of showing an insured or insurer must make on a duty to defend motion."** [*Liberty Mutual, supra,* 58 CA4th at 621 (emphasis added)]. The insurer is entitled to a ruling that it has no duty

to defend, or need defend no longer, *whenever* it can demonstrate that there is no possibility of coverage. Similarly, however, the California Supreme Court has held the insured is entitled to a defense *whenever* the insured can demonstrate that there is the merest possibility that an insurer must provide coverage. An insurer's duty to defend a claim **arises "[w]henever [the insurer] ascertains facts which give rise to the potential of liability under the policy."** *Gray,* supra, 65 C2d at 276-277 [emphasis added].

"[T]he insured is entitled to a defense if the underlying complaint alleges the insured's liability for damages *potentially* covered under the policy, or if the complaint might be amended to give rise to a liability that would be covered under the policy. . . ." *Montrose*, 6 C4th at 299 (emphasis added).

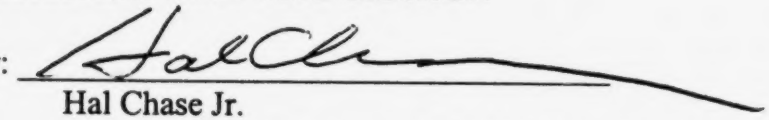
In the case at bar, the complaint was not "potentially" amendable, but was **actually** amended, and following amendment, the Third Amended Complaint was found to have triggered coverage under the State Farm policy for the employee/agent of the primary insured. Once the complaint was amended, which under California law renders the prior complaint moot ["Such amended pleading supplants all prior complaints. It alone will be considered by the reviewing court." *Foreman & Clark Corp. v. Fallon*, 3 Cal. 3d 875, 884; 479 P.2d 362, 92 Cal.Rptr. 162] the potential coverage existed, and the employer/agent was entitled to a defense, despite the Northern District's prior ruling that there was no duty to defend under the now defunct Second Amended Complaint. Under the "last in time" rule, it is the Central District ruling providing that State Farm had a duty to defend that must be given effect instead of the prior ruling by the Northern District.

CONCLUSION

Petitioner urges that the facts enumerated above constitute sufficiently discrete and identifiable issues to allow this Court to clarify the effect and extent of the national law regarding the application of *res judicata* principles and the application of the full faith and credit clause as it pertains to State Court judgments and Orders in Federal bad faith suits. As such, the within petition ought to be granted.

Respectfully Submitted,
DATE: June 13, 2001

LAW OFFICES OF JON-MARC DOBRIN
A PROFESSIONAL CORPORATION

By: 

Hal Chase Jr.
Attorneys for Petitioner JON-MARC DOBRIN

APPENDIX

APPENDIX

No. 99-55300
D.C. No. CV-97-09015-CBM

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JON-MARC DOBRIN, a Professional Corporation, individually and as the assignee of JAMES W. COULTER, Chapter 11 Trustee for GENTE UNIDA, INC., WESTERN REALTY, GLOVER RUSSELL COGAR, JR., THE COGAR FAMILY TRUST and SUNSHINE DIVERSIFIED, INC.

Plaintiff-Appellant

v.

STATE FARM FIRE AND CASUALTY COMPANY

Defendant-Appellee.

March 20, 2001, Filed

Before: D.W. NELSON, BRUNETTI, and KOZINSKI, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing. Judge Kozinski has voted to reject the petition for rehearing en banc, and Judges Nelson and Brunetti so recommend.

The full court has been advised of the petition for

rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R.App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

No. 99-55300
D.C. No. CV-97-09015-CBM

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JON-MARC DOBRIN, a Professional Corporation, individually and as the assignee of JAMES W. COULTER, Chapter 11 Trustee for GENTE UNIDA, INC., WESTERN REALTY, GLOVER RUSSELL COGAR, JR., THE COGAR FAMILY TRUST and SUNSHINE DIVERSIFIED, INC.

Plaintiff-Appellant

v.

STATE FARM FIRE AND CASUALTY COMPANY

Defendant-Appellee.

February 6, 2001, Filed

For the reasons stated in the district court's orders of May 18 and December 3, 1998, we affirm the court's finding that res judicata bars the instant action. In so doing, we reject appellant's contention that a recent change in the controlling principles of law supporting the original judgment precludes the application of res judicata here. *See* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 441 5 (1981) ("Change in the controlling principles of law ordinarily does not warrant denial of claim preclusion.") (citing cases). **AFFIRMED**.

No. 97-9015 CBM (Mcx)

UNITED STATED DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JON-MARC DOBRIN, a Professional Corporation, individually and as the assignee of JAMES W. COULTER, Chapter 11 Trustee for GENTE UNIDA, INC., WESTERN REALTY, GLOVER RUSSELL COGAR, JR., THE COGAR FAMILY TRUST and SUNSHINE DIVERSIFIED, INC.
Plaintiff-Appellant

v.

STATE FARM FIRE AND CASUALTY COMPANY
Defendant-Appellee.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

December 2, 1998 - Filed

The matters before the Court are: (1) Plaintiffs Motion for Summary Judgment, (2) Plaintiffs Motion for Reconsideration of this Court's May 18, 1998 order, and (3) Defendant's Motion for Summary Judgment. On November 16, 1998, the parties came before the Court, the Honorable Consuelo B. Marshall, United States District Judge, presiding. Upon consideration of the papers submitted and the arguments

of counsel, the Court DENIES Plaintiffs Motions, GRANTS Defendant's Motion and enters judgment in favor of Defendant State Farm.

I. BACKGROUND

In December of 1986, Belkis Casas ("Casas") approached Ben Hoktiongtojoa and offered to act as his agent for the sale of a real estate portfolio consisting of 16 properties. Ultimately, Cases' employer, Glover Russell Cogar, individually and through the Cogar Family Trust, purchased the properties. Cogar failed to make payments on the notes for the purchase of the properties and failed to close escrow.

Mr. Hoktiongtojoa instituted an action in state court entitled Hoktiongtojoa v. Cogar, et. al. Upon receiving notice of this action, both Belkis Cases and Glover Russell Cogar/Western Realty notified State Farm of their tender of defense in the Hoktiongtojoa Action. State Farm refused to defend either party in the action.

James Coulter (Coulter") served as chapter 11 trustee for Gente Unida, Inc., Western Realty, Glover Russell Cogar, Jr., the Cogar Family Trust and Sunshine Diversified, Inc. ("Plaintiffs") when they filed for bankruptcy. Coulter, as trustee, originally brought suit against State Farm ("Defendant") in the United States District Court for the Northern District of California in 1993 ("Cogar Action) for failure to indemnify and defend Plaintiffs in the Hoktiongtojoa Action. Judge Samuel Conti determined that Defendant did not owe a duty to defend or indemnify Plaintiffs and granted Defendant's Motion for Summary Judgment. Judge Conti's decision was subsequently affirmed by the Ninth Circuit.

Ms. Cases brought a separate action before this Court entitled, Casas v. State Farm Fire & Casualty, CV 95-4432 ("Cases Action"), for failure to indemnify and defend in the Hoktiongtojoa Action. This Court determined that State Farm did owe a duty to defend or indemnify Cases and granted Plaintiffs Motion for Summary Judgment. State Farm did not appeal this decision and paid the judgment.

Plaintiff Dobrin is the assignee of James Coulter. On December 8, 1997, Plaintiff Dobrin filed a complaint in this Court seeking damages from State Farm for alleged wrongful refusal to defend and indemnify Glover Russell Cogar, Jr. and the Cogar Family Trust in the Hoktiongtojoa Action. In an order dated May 18, 1998, this Court dismissed the claims of Mr. Cogar and the Cogar Family Trust holding that Judge Conti had conclusively adjudicated these issues and that Plaintiff was barred by res judicata from reasserting Cogar's claims against State Farm.[1]

Dobrin filed the instant Motion for Summary Judgment on August 4, 1998. The parties stipulated to a continuance of the motion to allow State Farm to file a cross motion. Defendant filed its motion for Summary Judgment on October 9, 1998.

II DISCUSSION

A. Standard for Summary Judgment

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[1]Plaintiff filed a motion for reconsideration of this dismissal. The motion fails to satisfy the requisites of L.R. 7.16 and is therefore DENIED.

Summary judgment may be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact," the burden of production then shifts so that the non-moving party must set forth, by affidavit or as otherwise
provided in Rule 56, "specific facts showing that there is a genuine issue for trial." T.W..Elec. Serv. Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (quoting Celotex Corp.v. Catrett 477 U.S. 317., 324 (1986)); Kaiser Cement Corp. v. Fishbach & More.Inc., 793 F.2d 1100, 1103-1104 (9th Cir. 1986), cert. denied, 479 U.S. 949 (1986).

If the non-moving party bears the burden of proof with respect to an element essential to the case, and that party fails to make a sufficient showing to establish a genuine dispute of fact with respect to the existence of the element, summary judgment is appropriate. California Architectural, 818 F.2d at 1468 (citing Celotex, 477 U.S. at 317).

B. The May 18`a Order

On May 18,1998, this Court granted State Farm's Motion to Dismiss Plaintiff s complaint based on the *res judicata* effect of Judge Conti's ruling in Cogar v. State Farm. On March 12, 1993, Judge Conti granted summary judgment for State Farm, holding that the claims in the state court action were based upon a contractual relationship and therefore were

not covered by the State Farm policy. The policies in question provided coverage "for damages because of bodily injury, personal injury, or property damage" for which the insured becomes legally liable. Judge Conti examined the policy provisions at length, and concluded that Hoktiongtojoa's claims against Cogar did not invoke State Farm's duty to defend.

James Coulter served as the Title 11 trustee for Cogar and the Cogar Trust. Jean-Mark I Dobrin ("Plaintiff') is the assignee of James Coulter. Therefore, the claims brought before this Court are identical to those that were before Judge Conti. In his opposition to Defendant's motion to dismiss, Plaintiff argued that this Court's ruling in the Casas action altered the legal landscape and required this Court to rule differently than Judge Conti on the issues involved in the Cogar action. In granting Defendant's motion to dismiss, this Court explicitly rejected Plaintiffs arguments, holding that:

> this Court's finding in Casas v. State Farm does not apply to Plaintiffs as they were not a party to that action nor was Casas a party to the Cogar action. Furthermore, the facts and allegations in Casas v. State Farm are different from those in both the Cogar Action and the present action. Hoktiongtojoa's causes of action against Casas were based on the fiduciary duty that Casas, as Hoktiongtojoa's real estate agent, owed to Hoktiongtojoa. Therefore, Hoktiongtojoa's claims against Casas were not dependent upon any contractual arrangement as was the case here and in the Cogar

action. (J. Marshall, May 15, 1998 Order, p. 5:3-9.)[2]

C. Basis of Plaintiffs Motion for SJ

Plaintiff titles his motion a "motion for partial summary judgment that Defendant State Farm . Fire & Casualty Co. had a duty to Defendant Western Realty in the Hoktiongtojoa Action." Dobrin's arguments in the instant motion for summary judgment essentially reiterate the arguments rejected in the May 18, 1998 order. Dobrin now contends that if Casas' potential liability for breach of fiduciary duty entitled her to coverage under the policy, Western Realty's potential liability for breach of fiduciary duty as Casas's employer should have implicated State Farm's duty to defend. This is the identical argument made regarding Mr. Cogar in Dobrin's opposition to State Farm'smotion to dismiss.

Western Realty is a fictitious name used by Cogar and his corporations. It appears that Plaintiffs motion is directed to the duty to defend Western Realty because Western Realty is the only name, other than Cogar and the Cogar Family Trust, actually listed in the insurance policy. The insurance policy was issued to the "individual" Cogar; however, on a declaration page of the policy, the insured is listed as "Cogar dba Western Realty." Plaintiff relies upon this single reference to argue that Western Realty was covered under the policy, *and* to make the

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[2]Plaintiff argues that a Third Amended Complaint was filed in the Hoktiongtojoa action after Judge Conti's ruling, and that res judicata therefore does not apply to the additional claims in the Third Amended Complaint. However, the amendments all fall within the scope of Judge Conti's reasoning and the additional claims did not implicate a duty to defend.

argument that because Gente United Inc. also did business as Western Realty, it was covered by the insurance policy as well. In further support of this notion, Plaintiff submits a declaration of G. Russell Cogar, in which he states that he "obtained the State Farm Business Policies for the specific purpose of insuring Gente Unida dba Western Realty, Huntington Properties, Inc. and Sunshine Diversified, Inc." (Cogar Decl., ¶7)[3]

C. Res Judicata and Collateral Estoppel Effects of Judge Conti's Order

There are two independent bases for granting summary judgment for Defendants against any claims assigned by Gente Unida, Western Realty, or Sunshine Diversified: (1) none of these corporate entities are insureds under the policy; and (2) the entities' claims are barred by the doctrine of res judicata.

First, neither Gente Unida or Sunshine Diversified are mentioned in the policy. As mentioned above, Mr. Cogar's declared intention to purchase a policy to cover these corporations is inadmissible. Thus, Plaintiff relies exclusively on the syllogism that the policy covered "Cogar dba Western Realty," and Gente United did business as Western Realty, thus Gente United is covered by the policy. This logic is fundamentally flawed. The State Farm policy .identifies the insureds as "individuals" and not as any business form. Further,

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[3]State Farm make an appropriate objection to this declaration based upon the parol evidence rule. The clear language of the policy provides coverage for only an "individual," named as Russell Cogar, and for certain properties listed in the policy. The only mention of Western Realty was as a "dba" for Mr. Cogar, and not for his other corporations. Therefore, the Court sustains State Farm's objections to this declaration.

the policies covered identified business premises, owned by Cogar and his family trust, not Gente or Sunshine. (Exh "I", p. 634).

Second, even if the Court found that the policy covered Gente and Sunshine, these entities are "privies" of Russell Cogar and their claims are barred by res judicata. A former judgment may be binding on persons who, though not parties to the former judgment, were in privity with a party. In re Gottheiner, 703 F.2d 1136, 1138 (9" Cir. 1983). On February 6, 1992, Mr. Dobrin tendered the Hoktiongtjoa Action to State Farm, stating that he was representing the Cogars, their trust, Western Realty and Sunshine Diversified; that the tender was on behalf of all these entities; and that a defense was sought under "any and all State Farm Policies issued from 1986 to the present." (Exh. "E" to Plaintiff s 8/4/98 Memo, p. 130). To the extent the policy covered these entities, they should have been joined in the original federal action. The issues regarding coverage of these entities have now been fully adjudicated by Judge Conti and are res judicata. Davis & Cox v. Summa Corp., 751 1507, 1518 (9th Cir. 1985).

"The person being estopped from relitigating an issue must have been either a party to the prior lawsuit or have been so closely related to the interest of the party to be fairly considered to have had his day in court." Id, (citing Chicago. Rock Island and Pacific Railway Co. v. Schendel, 270 U.S. 611, 618 (1926)); See also Nordhorn v. Ladish Co., 9 F.3d 1402, 1405 (9th Cir. 1993). "[W]hen a person owns most or all of the shares in a corporation and controls the affairs of the corporation, it is presumed that in any litigation involving the corporation, the individual has sufficient commonality of interests to establish privity." Gottheiner, 703 F.2d at 1139-40. Further, public policy supports a finding of privity between a

close corporation and its controlling shareholder. Sparks Nugget Inc. v. Commissioner, 458 F.2d 631, 638-9 (9Y' Cir. 1972).

Both Gente and Sunshine have filed for Bankruptcy, but prior to their dissolution, Cogar was the majority shareholder of Sunshine (with the remaining shares owned by his two daughters), and was the exclusive owner of Gente Unida. (Exh. "I," p. 637-45; Exh. "J" Cogar Depo; 24:11-27:25 and). Cogar, filed a Chapter 11 bankruptcy not only on behalf of himself and his family trust, but also on behalf of Gente and Sunshine, and the bankruptcy petition identifies Gente and Sunshine as "other names" used by Cogar. (Exhibit "G"). Finally, both corporations operated out of the premises owned by the Cogar family trust and both operated exclusively though Cogar's real estate brokers license. (Exhibit "I" pp. 641-42).

Thus, the unity of interests between Cogar, Gente, and Sunshine is sufficient to bar the corporations from relitigating the issues conclusively adjudicated by Judge Conti in the Cogar Action. Accordingly, Defendant's Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED:

DATE: 12/1/98

CONSUELO B. MARSHALL UNITED STATES DISTRICT JUDGE

No. 97-9015 CBM (MCx)

UNITED STATED DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JON-MARC DOBRIN, a Professional Corporation, individually and as the assignee of JAMES W. COULTER, Chapter 11 Trustee for GENTE UNIDA, INC., WESTERN REALTY, GLOVER RUSSELL COGAR, JR., THE COGAR FAMILY TRUST and SUNSHINE DIVERSIFIED, INC.

Plaintiff-Appellant

v.

STATE FARM FIRE AND CASUALTY COMPANY

Defendant-Appellee.

May 18, 1998 - Filed

ORDER RE DEFENDANT'S MOTION FOR PARTIAL DISMISSAL FOR FAILURE TO STATE A CLAIM 12 (b)(6)

The matter before the Court, the Honorable Consuelo B. Marshall, United States District Judge, presiding, is Plaintiff Jon-Marc Dobrin's ("Dobrin") Motion to Dismiss for Failure to State a Claim pursuant to Fed. R. Civ. P. 12(b)(6). The Court has considered the motion papers and the parties' arguments and issues the following Order.

BACKGROUND

Plaintiff Dobrin is the assignee of James Coulter ("Coulter"). Coulter served as chapter 11 trustee for Gente Unida, Inc., Western Realty, Glover Russell Cogar, Jr., the Cogar Family Trust and Sunshine Diversified, Inc. (collectively hereinafter, "Plaintiffs") when they filed for bankruptcy.

Plaintiffs seek damages from Defendant for alleged wrongful refusal to defend and indemnify Glover Russell Cogar, Jr. and the Cogar Family Trust in the action entitled Hoktiongtjoa v. Cogar. et.. al., ("Hoktiongtjoa Action") filed in Los Angeles Superior Court in 1991. In December of 1986, Hellos Casas ("Casas") approached Hoktiongtjoa and offered to act as his agent for the sale of a real estate portfolio consisting of 16 properties. Ultimately, Casas' employer, Glover Russell Cogar, individually and through the Cogar ' Family Trust, purchased the properties. Cogar failed to make payments on the notes for the purchase of the properties and failed to close escrow.

Coulter, as trustee, originally brought suit against State Farm ("Defendant") in the United States District Court for the Northern District of California in 1993 ("Cogar Action") for failure to indemnify and defend Plaintiffs in the Hoktiongtjoa Action. Judge Samuel Conti determined that Defendant did not owe a duty to defend or indemnify Plaintiffs and granted Defendant's Motion for Summary Judgment. Judge Conti's decision was subsequently affirmed by the Ninth Circuit.

DISCUSSION

A. Standard for Res Judicata.

The doctrine of res judicata bars a subsequent action between the same parties or their privies over the same cause of action in which a final judgment was rendered. Blonder-Tongue Laboratories v. University of Illinois Found., 402 U.S. 313, 323-324, 91 S.Ct. 1434, 1440-1441; Davis & Cox y. Summa Corp., 751 1507, 1518 (9th Cir. 1985). A federal court sitting in diversity must apply the res judicata law of the state in which it sits. Graham v. Lincoln, 257 F.2d 250, 255 (9th Cir. 1958). However, California law determines the res judicata effect of a prior federal court judgment by applying federal law. Constantini v. Trans World Airlines, 681 F.2d 1 199 (9th Cir. 1982).

In determining whether successive lawsuits involve the same claim for purposes of res judicata, the Ninth Circuit considers the following factors: 1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; 2) whether substantially the same evidence is presented in the two actions; 3) whether the two suits involve infringement of the same right; and 4) whether the two suits arise out of the same transactional nucleus of facts. Nordhorn v. Ladish Co.. Inc.. 9 F.3d 1402, 1405 (9th Cir. 1993).

B. Plaintiffs' Claims Are Dependent Upon a Contractual Obligation and Therefore Are Not Covered By Defendant's Policies.

Plaintiffs assert that the issues presented in this action and the Cogar Action are not identical, as Judge Conti based his decision upon an interpretation of Hoktiongtjoa's Second Amended Complaint instead of Hoktiongtjoa's Third Amended Complaint. Plaintiffs contend that the additional claim of waste

by Hoktiongtjoa in the Third Amended Complaint, which was not alleged in the Second Amended Complaint, was the type of claim that would have obligated Defendant to defend and indemnify Plaintiffs. (Opposition, pg. 7; Motion, Ex. B, ¶189.) Since this additional allegation was not considered by Judge Conti nor the Ninth Circuit, Plaintiffs claim that res judicata should not bar this present action.

Standard liability insurance contracts stating that "the insurer shall pay all damages which the insured shall become legally liable to pay as a result of property damages or bodily injury," provides coverage only for tort liability. Insurance Co. of the West v. Haralambos Beverage Co., 195 Cal.App.3d 1308, 241 Cal.Rptr. 427, 430 (1987). If a claim is dependent upon the existence of an underlying contract, the claim sounds in contract, as opposed to tort. Stanford Ranch. Inc. v. Maryland Casualty Co., 89 F.3d 618, 625-626 (9th Cir. 1996) (citing Haralambos, 241 Cal.Rptr. at 430-431 (negligent and intentional misrepresentation and nondisclosure causes of action were contractual because a finding of liability is dependent upon the existence of a contract.)).

Judge Conti determined in the Hoktiongtjoa Action, that the insurance policies issued by Defendant in favor of Cogar, on behalf of Plaintiffs, were standard liability policies that did not provide coverage if the insured became liable for breach of a contractual agreement. (Motion, Ex. E, pg. 310.) In the Cogar Action, Plaintiffs' claims, including breach of contract, breach of the covenant of good. faith and fair dealing, and declaratory relief were all dependent upon Cogar's contractual agreement with Hoktiongtjoa and, therefore, did not obligate Defendant to defend or indemnify Plaintiffs.

Similarly, the additional allegation of waste in the Third Amended Complaint in the Hoktiongtjoa Action is also dependent upon Plaintiffs' contractual agreement with Hoktiongtjoa. Absent the contract to sell Hoktiongtjoa's s 16 properties to Cogar, Cogar Would not have had a duty to maintain or care for the properties in question. Therefore the additional claim of waste does not change-the analysts,-as all of the issues arise out of the contractual relationship between Hoktiongtjoa and Cogar.

During oral arguments, Plaintiffs cited Weiss v Marcus, (1975) 51 Cal.App.3d 590 [124 Cal.Rotr. 297) and Liberty Mutual Insurance Co. v. Superior Court, (1997) 58 Cal.App.4th 617 [68 Cal.Rptr.2d 219] in support of their Opposition. Neither case supports Plaintiffs argument that res judicata should not apply in this matter. Weiss stands for the proposition that a constructive trust is an equitable remedy, not a contractual remedy., 51 Cal.App.3d at 600. While this is true, in the Hoktiongtjoa Action, a constructive trust could only be established against Plaintiffs as a result of the contractual relationship that existed between Hoktiongtjoa and Plaintiffs.

The Liberty Mutual Court, based on its reading of Haskel, Inc v. Superior Court (1995) 33 Cal.App.4th 963 [39 Cal.Rptr.2d 520], found that an insurer can bring a motion for summary judgment or summary adjudication at any time the insurer determines that the insurer does not owe a duty to defend. Liberty Mutual, 58 Cal.App.4th at b22-b23. Even if we apply this reasoning to an insured, it would not affect the principles of res judicata, as Hoktiongtjoa's additional claim of waste would not alter Defendant's duty to defend or indemnify Plaintiffs.

C. No Modification of Significant Facts Exist to Crete a New Legal Condition.

"Res judicata is no defense where, between the first and second suits, there leas been a change in the law or modification of significant facts creating new legal conditions." Jackson v. DeSoto Parish School Board, 585 F.2d 726, 729 (5th Cir. 1978); West Coast Life Ins. Co. v. Merced IRR Dist. 114 F.2d 654m 661-661 (I940). Plaintiffs assert that this Court's finding that Defendant owed a duty to defend Casas in Casas v. State Farm, CV95-4432 (CBM), is a significant change in fact creating a new legal condition.

However, this Court's finding in Casas v. State Farm does not apply to Plaintiffs as they were not a party to that action nor was Casas a party to the Cogar action. Furthermore, the facts and allegations in Casas v. Slate Farm are different from those in both the Cogar Action and the present action. Hoktiongtjoa's causes of action against Casas were based on the fiduciary duty that Casas, as Hoktiongtjoa's real estate agent, owed to Hoktiongtjoa. Therefore, Hoktiongtjoa's claims against Casas were not dependent upon any contractual arrangement as was the case here and in the Cogar action.

Res judicata is appropriate to preclude Plaintiffs' claims in the present action.

D. Res Judicata Precludes Plaintiffs from Relitigating Their Claim.

Based on the criteria established by the Ninth Circuit, the present action and the Cogar Action involve the same claim. Both lawsuits share the same transactional nucleus of facts,

namely whether Defendant owed an obligation to defend and indemnify Plaintiffs. Defendant's obligation to defend and indemnify Plaintiffs in the Hoktiongtjoa Action was asserted by Plaintiff in each lawsuit. Both lawsuits depend on the same evidence; namely, Defendant's policies, the Hoktiongtjoa complaints and evidence of Defendant's handling of the claim.

CONCLUSION

For the foregoing reasons, this Court GRANTS Defendant's Motion to Dismiss with prejudice.

IT IS SO ORDERED.

DATED: 5/15/98

CONSUELO B. MARSHALL UNITED STATES DISTRICT JUDGE

No. CV 95-4432-CBM

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BELKIS CASAS,

Plaintiff

v.

STATE FARM FIRE AND CASUALTY COMPANY, an Illonois Corporation,

Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

May 9, 1996 - Filed

The motion of Plaintiff BELKIS CASAS ("CASAS") for. summary judgment that Defendant STATE FARIM FIRE AND CASUALTY COMPANY ("STATE FARM") had a duty to defend her in Hoktiongtjoa v. Cogar, Casas, et al., Los Angeles Superior Court, Case No. BC 025 932, came before the Court on March 26, 1996.

The parties appeared by their counsel of record. Having heard such oral argument on the matter, and having reviewed the pleadings and declarations cited by the parties, the Court. for good cause makes the following findings of fact:

FINDINGS OF FACT

1. In 1986. and 1987. CASAS, was employed as a real estate agent by real estate broker G. Russel Cogar ("COGAR").

2. Cogar purchased insurance coverage for his business from STATE FARM, including coverage under Policy No. 90-80-4922-7 [in effect from August 19, 1986 through August 19, 1989; Policy No. 90-35-2365-9 [in effect from November 11, 1986 through December 16. 1988], and Policy No. 90-06-6560-6 (in effect from July 13, 1989 through July 13, 1993).

3. State Farm Policy No. 90-80-4922-7 includes a "Real Estate Agents Endorsement" (REA Endorsement").

4. The REA Endorsement limits the policy's Business Liability coverage to "bodily injury and property damage arising out of the ownership... maintenance or use of: (1) such part of any premises used by the insured for general office purposes; and (2) premises listed with the insured for sale or rental."

5. CASAS was named as a defendant in a complaint filed in Los Angeles Superior Court by Den Hoktiongtjoa, Hoktiongtjoa vs. Cogar. Casas, et al., Los Angeles Superior Court, Case No. BC 025 932.

6. Among other allegations, Hoktiongtjoa alleged that CASAS breached her fiduciary duties to him as a real estate agent.

7. CASAS tendered the defense of the Hoktiongtjoa action to STATE FARM, specifically informing STATE FARM that Hoktiongtjoa alleged that she had breached her fiduciary duties

to Hoktiongtjoa and also informing STATE FARM that Hoktiongtjoa had claimed bodily injuries resulting from said breach.

8. The STATE FARM policies provide coverage for bodily injury, progeny damage and personal injury.

9. Under the provisions of the policies. STATE FARM had a duty to defend any claim or suit against CASAS seeking damages payable under the policies, even though the allegations of the suit may be groundless, false or fruadulent.

10. "Bodily injury" as defined in the policies. includes "injury, sickness or disease."

11. "Property damage as defined in the policies includes "loss of use" caused by an occurrence during the policy period.

12. In his paryer for relief. Hoktiongtjoa requested the return of his properties by imposition of a constructive and resulting trust.

13. "Personal injury" as defined in the policies, includes "other invasion or the right of' private occupancy" (which has been defined in the case: law as interference with the "use and enjoyment of real property").

14. Hoktiongtjoa alleged that he had been denied the "ownership benefits, rental and value" of his properties as a result of the actions of CASAS and the other defendants in that case.

15. The activities alleged in the Hoktiongtjoa complaint to have

caused injury Hoktiongtjoa occurred between 1936 and 1990; within the coverage periods of the State Farm policies.

16. On July 24, 199, the Los Angeles Superior Court entered judgment for CASAS on all counts in the Hoktiongtjoa action and dismissed her from the action.

17. Hoktiongtjoa's claim that he was denied the "ownership benefits, rental and value" of his real properties was a claim of interference with the use and enjoyment of his property. This qualities as a claim of injury arising from an "invasion of the right of private occupancy" as that term has been defined by federal courts, California courts, and other jurisdictions. , See, e.g. American States Insurance Co. v. Canyon Creek, 786 F. Supp. 821 (N.D. Cal. 1991); Wananch v. Gulf Insurance Co. 213 Cal. 3d 356; 266 Cal. Rptr. 327 (1990); Gardner v. Romano, 688 F. Supp. 489, 492-493 (E.D. Wis. 1933); Town of Goshen v. Grange Mutual Insurance Co, 424 A.2d 822, 823 825 (1980); Town of Stoddard v Northern Sec. Insurance Co. Inc,, 718 F. Supp. 1062 (1989).

The California Supreme Court has held that "a bare potential or possibility of coverage" triggers the insurer's duty to defend Montrose Chemical Corp. v.Superior Court 6 Cal.4th.287, 300: 24 Cal.Rptr.104; 419 P.2d 163, 1966 (emphasis added).

Unlike tile duty to indemnify, which is determined only after liability is finally established, the duty to defend must be assessed at the outset of the case (i.e., the Insurer's duty to defend depends on facts 1;n own to tile insurer at the inception of tile third party's suit against the insured). CNA Casualty of California v Seaboard Surety Company 176 Cal. App. 3d 598

605; 222' Cal. Rptr. 276 (1986)

"[T]he insured is entitled to a defense if the underlying complaint alleges the insured's liabilityfor damages potentially covered under the policy, or if the complaint might he amended to give rise to a liability that would ha covered under tile policy . . . .[T]he insurer must defend in some lawsuits where liability under the policy ultimately fails to materialize," Montrose Chemical Corp. v Superior Court, 6 Cal.4th 287, 299; 24 Cal. Rptr. 2d 467; 861 P.2d 1153 (1993). (emphasis added)

The duty to defend extends to claims against the insured that are groundless, false or fraudulent, if the policy so provides. CNA Casualty *supra*, 176, CA.3d at 606,

As noted above, CASAS presented facts indicating that the duty to defend was triggered under three separate coverages of the policy: bodily injury, property damage and personal injury. If Hoktiongtjoa prevailed, he would have been entitled to recover for all damage proximately caused by the breach [California Civil Code Section 3333 and Salahutdin v. Valley of California, Inc., 24 Cal. 4th 555, 29 Cal. Rptr. 2d 463 (1994)]. Thus, there was a potential that CASAS would be liable foe damages arising from Hoktiongtjoa's alleged personal injury, bodily injury and property damage.

Finally, even if CASAS would only faced a potential of liability for intentional breach of fiduciary duty, STATE FARM's duty to defend would still have been triggered. As the California Supreme Court recently reaffirmed in Horace. Mann Insurance Company v Barbara B., 4 Cal. 4th 1076, 1087; 17 Cal. Rptr. 2d 210; 846 P.2d 792 (1993): "It is Important to remember that no public policy forbids the *defense* of claims

alleging intentional acts." CASAS denied having breached any duty to Hoktiongtjoa and, under the policy, she was entitled to a defense of "groundless, false and fraudulent" claims.

For all the above reasons. the Court holds that STATE FARM's duty to defend CASAS was triggered by the allegations of the Hoktiongtjoa complaint and the information contained in CASAS's tender letter to STATE FARM.

WHEREFORE, IT 1S HEREBY ORDERED THAT:

The motion for summary judgment of Plaintiff BELKIS CASAS that Defendant STATE FARM FIRE AND CASUALTY had a duty to defend her in the Hoktiongtjoa action is granted.

Dated: 5/9/96

Honorable Consuelo B. Marshall
United States District Judge

No. 93-16203

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

James W. COULTER,

Trustee, Plaintiff-Appellant
v.

STATE FARM FIRE & CASUALTY COMPANY

Defendant-Appellee.

Decided Jan. 5, 1995.

Appeal from the United States District Court, for the Northern District of California, D.C. No. CV-92-03710-SC; Samuel Conti, District Judge, Presiding.

N.D.Cal.

AFFIRMED.

Before: SKOPIL, NORRIS and HALL, Circuit Judges.

MEMORANDUM

James W. Coulter, Chapter 11 Trustee for the Bankruptcy Estate of Gilbert Russell Cogar, Jr. ("Cogar"), appeals the district court's order granting summary judgment in favor of State Farm Fire and Casualty Company ("State Farm") and the denial of Cogar's motion for reconsideration. We affirm.

Appellant contends that State Farm is obligated to defend Cogar in an underlying state court action entitled *Hoktiongtjoa v. Cogar* because Hoktiongtjoa's suit potentially seeks damages for an "invasion of the right of private occupancy" within the meaning the relevant insurance policies. This argument is based on two portions of the Second Amended Complaint. First, Hoktiongtjoa alleges that Cogar's actions caused him to be "denied the ownership benefits, rental and value of his properties...." Second, the prayer for relief includes a request for the imposition of a constructive and resulting trust on the properties still in Cogar's possession.

Appellant offers a number of cases as authority for his position, all of which are distinguishable. The unifying theme in Appellant's cases is that each plaintiff sought to make an immediate use of the property--i.e., to live there, to develop it, or to rent it out. In those contexts, there might be some logic in construing a plaintiff's injuries as an invasion of the right private occupancy. In stark contrast, Hoktiongtjoa's immediate goal was to divest himself of ownership of the real estate parcels so as to realize a long-term monetary benefit. Thus, we are not persuaded that Cogar is entitled to coverage under the relevant policies.

A number of other cases support our conclusion. In Titan Corp. v. Aetna Casualty and Surety Co., 27 Cal.Rptr.2d 476 (Cal.App.1994), which held that the term "wrongful entry or eviction or other invasion of the right of private occupancy" did not cover property damage caused by pollution, the Court noted that under the principle of *ejusdem generis,* the term "other invasion of the right of private occupancy" should be interpreted to mean "the functional equivalent of 'wrongful entry or eviction.' " Id. at 487. The Court stated further that "[t]he

term 'other invasionof the right of private occupancy' draws meaning and content from the preceding language: 'wrongful entry or eviction.' Such language connotes *disruptions of the ability of a landowner to actually occupy his property...."* *Id.* (emphasis added). *See also* Pipefitters Welfare Educ. Fund. v. Westchester Fire Ins. Co., 976 F.2d 1037, 1041 (7th Cir.1992) (disapproved on other grounds by Titan, 27 Cal.Rptr.2d 476) ("The principle of *ejusdem generis* ... provides that where a general term follows a series of specific terms, the former should not be given its broadest possible meaning, but rather extends only to matters of the same general class or nature as the terms specifically enumerated. Accordingly, we must interpret the catch-all phrase 'other invasion of the right to private occupancy' as encompassing only conduct of the same general type as eviction and wrongful entry."); Martin, 699 F.Supp. at 170 (" 'Other invasion of the right of private occupancy' is simply *part* of a more complete definition of 'personal injury,' following directly on the heels of 'wrongful entry or eviction.' Ejusdem generis principles draw on the sensible notion that words such as 'or other invasion of the right of private occupancy' are intended to encompass actions of the same general type as, though not specifically embraced within, 'wrongful entry or eviction.' "); Waranch v. Gulf Ins. Co., 266 Cal.Rptr. 827, 828-29 (Cal.App.1990) (under principles of *ejusdem generis,* policy language covering "invasion of private occupancy" applied to wrongful evictions, entries or other similar violations of quiet occupancy) (citing Martin v. Brunzelle, 699 F.Supp. 167 (N.D.Ill.1988)). Hoktiongtjoa has not alleged that his interest in the parcels has been compromised in a way that is encompassed by the policy language.

Nor can it be said that the relevant policy language is, in the context of this case, ambiguous. Although a court must

construe an insurance policy from the perspective of a reasonable lay person, resolving any ambiguities in favor of the insured, a court must also refrain from indulging in strained constructions to find coverage. Fragomeno v. Insurance Co. of the West, 255 Cal.Rptr. 111, 114 (Cal.App.1989). Under principles of *ejusdem generis,* it would not be reasonable for an insured to expect coverage where the essence of a plaintiff's complaint is not that he has been deprived of the use of or the ability actually to occupy property, but rather that the defendant has failed to live up to his contract-based financial obligations.

Appellant next argues that if Hoktiongtjoa can establish sufficient ownership interest in the property to be characterized as a constructive or resulting trust beneficiary, he will necessarily have established that Cogar interfered with his right to possess an interest in the property. Thus, Cogar may be liable to him for an invasion of the right of private occupancy. This argument is strained and, ultimately, unpersuasive. As stated in *Titan,* "other invasion of the right of private occupancy" encompasses actions which, like wrongful entry and eviction, disrupt the owner's ability to actually occupy property. Titan, 27 Cal.Rptr.2d at 487. The damage allegedly caused by Cogar is simply not an injury of "the same general type" as wrongful entry or eviction. Martin, 699 F.Supp. at 170. **AFFIRMED.**

This panel unanimously agrees that this case is appropriate for submission without oral argument. Fed.R.App.P. 34(a); 9th Cir.R. 34-4.

This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

No. C 92-3710 SC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

G. RUSSELL COGAR, individually and as trustee of the COGAR FAMILYTRUST DATED 1983, and as successor in interest to ELIZABETH J. COGAR (deceased),

Plaintiff

v.

STATE FARM FIRE AND CASUALTY INSURANCE COMPANY, an Illonois corporation,

Defendant.

March 15, 1993 - Filed

ORDER RE MOTION FOR PARTIAL SUMMARY JUDGMENT

I . INTRODUCTION

Plaintiff C. Russell Cogar ("Cogar") .purchased. a number of general liability. insurance policies from defendant state Farm Firs and Casualty Company ("State Farm"). State Farm has refused to defend Cogar in- a pending state court suit against him for breach of contract and fraud arising out of a real estate transaction (the "Underlying Action") . Cogar .brought this action against State Farm; alleging inter alia that State Farm

breached the insurance contract in bad faith.

The case is currently before the court on the parties' cross-motions for partial summary judgment. Cogar seeks an order requiring state Farm to defend him in the Underlying Action. Skate Farm seeks a declaration that it is not obligated to defend or indemnify Cogar, and that it has not breached the insurance policies in bad faith.

II. FACTS

The parties submit to the court a joint statement of undisputed facts, which is summarized as follows:

A. The Underlying Action

Ben Hioktiongtjoa filed. suit against Cogar in the California Superior Court for Los. Angeles County[1]. Hoktiongtjoa claims that on December 29, 1986, he entered into a contract with: Cogar, Cogar ' s wife, and the Cogar Family Trust, of hich Cogar is trustee. Pursuant to the contract, Cogar purchased 12 parcels of real property from Hoktiongtjoa, and delivered to Hoktiongtjoa a promissory note for $1,400,000. On February 2, 1987, Cogar and Hoktiongtjoa allegedly agreed to add four additional parcels to the sale, and Cogar delivered to Hoktiongtjoa another promissory note for $579, 000. Some, but not all, of these promissory notes were secured by deeds of trust on the properties. Hoktiongtjoa alleges that Cogar stopped making payment under the promissory notes. He claims that Cogar owes him the sum of $1,666,300.

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[1]Hoktiongtjoa v. Cogar et al. No. HC 025 032 (Cal Super. Ct.).

Hoktiongtjoa's Second Amended Complaint (the"Complaint") asserts eighteen causes of action against Cogar. The first through the sixth causes of action are for breach of contract and failure to make payments under the various promissory notes. The seventh cause of action is for conspiracy to defraud. The eighth cause of action is for fraud. The ninth and the seventeenth causes of action are common counts for money allegedly due and swing. Hoktiongtjoa The. tenth through the sixteenth causes of action are for foreclosure of the deeds of trust. In the eighteenth pause of' action, Hoktiongtjoa alleges that two corporations owned by Cogar are his fraudulent alter ego.

B. The Insurance Policies

Cogar rendered the defense of the Underlying Action to State Farm under a total of twenty-three liability policies purchased from. State Farm. Cogar was the insured under nineteen rental dwelling policies, eight apartment policies, two business policies, and, four homeowners policies.

All of the policies in question provide coverage "'for damages because of bodily injury, personal injury or property damage" for which the insured becomes legally liable. The bodily injury, personal injury, or property damage must be the result of an "occurrence," a term of art used to describe the event or events that lead to liability on the part of the insured. Interpretation of this term is the key to whether coverage exists for the Underlying Action.

Under the homeowner's policies, an occurrence is defined as "an accident . . . which results in bodily injury or property damage during the policy period."

There are two different forms of rental dwelling policies. In,the first form of rental dwelling policy, FP-8103.2, there is no definition of "occurrence." However, that policy expressly excludes all, coverage for "bodily injury, personal injury, or property damage which is expected or intended by the insured" (Emphasis supplied.)

The second form of rental dwelling policy, FP-8103 . 3 , defines-an occurrence as "an accident . . . which results in: (a.) bodily injury. (b.) property damage; or (c.)personal injury; during the policy period."

The business policies and the apartment policies define an occurrence as "an accident which results in bodily injury or property damage neither expected nor intended. . . and with respect to personal injury, the commission of an offense . . ." The meaning of "personal injury" is restricted to injury arising from certain offenses, including wrongful entry or eviction or other invasion of the right to private occupancy." Interpretation of the phrase "right to private occupancy" is also important to the decision on the instant motions.

III. DISCUSSION

Summary judgment is proper if there is no genuine issue of material fact and the moving Party is entitled to prevail as a matter of law. Fed. R. Civ. P. 56 (c) .

Here, the issue before the court is whether the Underlying Action possibly could result in liability covered under Cogar's policies with State Farm. If any such possibility exists, no matter how slight, then Cogar is entitled to an order requiring State Farm to defend him in the Underlying Action.

Gray v: Zurich` Ins. CO . , 65 Cal.2d 263, 275 (1966). However, if no such possibility exists, then State Farm is entitled to a declaration that (1) it is not obligated to indemnify or defend Cogar in the Underlying Action; and (2) it did not breach the insurance policies.

Although the Complaint in the Underlying Action alleges
eighteen separate causes of action, it states only two types of theories for recovery: fraud, and breach of contractual agreements (the promissory notes). Cogar also contends that the complaint can be read to allege a theory of negligence. The court must inquire whether damages covered by Cogar's policies could be awarded under any of these theories of recovery.

A. Claims for Fraud

Cogar's policies with State Farm provide coverage only for damages arising out of an 'occurrence.'" The homeowner's policies expressly state that an "occurrence" must he an accident. The different forms of rental dwelling policies either state that an "occurrence" must be an accident, or they expressly exclude from coverage the Intentional acts of the insured. Fraud cannot happen accidentally, it is by definition an intentional tort. Thus, State Farm cannot be obligated to indemnify Cogar under the homeowner's policies or the rental dwelling policies for any damages arising out of a claim for fraud.

The business policies and the apartment policies also define an "occurrence" as an "accident;" but only for bodily injury or property damages. With respect to personal injury, an

"occurrence" is defined as an "offense. "Under these policies, however, the definition of "personal injury" is carefully. limited to injury arising from certain offenses," including false arrest or imprisonment, libel and slander, and wrongful eviction. Fraud is not among the offenses listed.

Injury that arises from "invasion of the right to private occupancy" is covered as a "personal injury" under the business and apartment policies. Cogar argues that it is possible in the Underlying Action for Cogar to be held liable for damages for violating Hoktiongtjoa's right to private occupancy. It is difficult, though, for this court to see how.. By .the terms of his Complaint, Hoktiongtjoa did not plead a cause of action for any such offense.

Cogar', however, points to a portion of the Complaint where Hoktiongtjoa alleges that he was deprived of his ownership, rental and value, of his properties." (Hoktiongtjoa's Compl. 68.) Cogar asserts that this allegation states a claim for violation of the right to private occupancy. The insurance policies, though, clearly liken "violation of the right to private occupancy" to _ wrongful entry or eviction. This suggests that this right arises from one's privacy interest in the place where one lives. Hoktiongtjoa alleges that he was deprived of ownership, as distinct from occupancy. Hoktiongtjoa held the properties in question for investment purposes. Nowhere does Hoktiongtjoa claim that he intended personally to physically occupy these parcels of land, which is what would be required to assert a right to private occupancy.

Moreover, Hoktiongtjoa does not possess a right to privately occupy property that he sold to Cogar. It is not disputed in the Underlying Action that Hoktiongtjoa delivered grant deeds to Cogar. Hoktiongtjoa is not asserting a right to

damages, because Cogar is wrongfully occupying Hoktiongtjoas property; on the contrary, Hoktiongtjoa is claiming that he Cogar owes him money on promissory notes in connection with the sale of property. As a matter of law, this is not a violation of the right to private occupancy under the policies.[2]

Thus, none of Cogar's policies provide him with coverage for Hoktiongtjoa's claims for fraud. State Farm has no duty. to defend or indemnify Cogar in the Underlying Action based on these claims.

B. Claims for Breach .of Contractual Agreements

Language in standard liability insurance contracts to the effect that "the insurer shall pay all damages which the insured shall become legally liable to pay as a result of property damages or bodily injury" provides coverage only for tort liability, not contract liability. Insurance Co. of the West v. Haralambos Beverage Co., 195 Cal. App. 3d 1308 (1987) .

The policies at issue here are all standard general liability policies without modification. They provide no coverage if the insured becomes liable for breach of a contractual agreement. State Farm, therefore, is not liable to indemnify or defend Cogar in the Underlying Action based

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[2]Cogar argues that the phrase "right to private occupancy" must be read to include Hoktiongtjoa 's allegations, citing the .maxim that courts must construe. any ambiguity in an insurance contract against the insurer. Hovever the court does not find any ambiguity in this phrase as applied to the allegations in Hoktiongtjoa's Complaint. Whatever the parameters. of the "right to private occupancy," Hoktiongtjoa is not seeking damages for a violation- of this right.

on Hoktiongtjoa's claims for breach of the promissory notes.

C. Claims for Negligence

Cogar contends that the Complaint can be read to assert a claim for negligent breach of fiduciary duty against one of Cogar's employees. Cogar asserts that he would be personally liable under this theory, and that these damages are covered under the policies.

Hoktiongtjoa however, does not allege anything other than intentional conduct in his Complaint. His causes of action are for fraud and breach of contract, all arising from the core allegation that Cogar intentionally did not pay the amounts due. under the, promissory notes. The Complaint cannot be fairly read to include an allegation that Cogar or anyone employed by him negligently failed to pay the almost $2,000,000 allegedly owed Hoktiongtjoa. "An insurer is not obligated to defend its insured when the basis for claiming potential liability under the policy is so tenuous and far-fetched." Giddings v. Industrial - Indemnity Corp., 112 Cal. App. 3d 213; 220 (1980).

IV. CONCLUSION

There. is no chance that damages covered under Cogar's policies will be awarded in the Underlying Action. Therefore, it is hereby ORDERED that:

Cogar's motion for summary judgment is DENIED;

State Farm's motion for summary judgment is GRANTED.

It is ORDERED, ADJUDGED and DECREED that State Farm

does not have to defend or indemnify Cogar in Hoktiongtjoa v. Cogar, et al.. No... BC 025 032 (Cal Super. Ct.) State Farm did not breach any of Cogar's insurance policies, and did not act in bad faith.

IT IS SO ORDERED.
Dated: March 12, 1993.

SAMUEL CONTI

UNITED STATES DISTRICT JUDGE

IT IS FURTHER ORDERED that a status conference and trial setting be held on July 9, 1993 at 10:00 a.m, in Courtroom 1, United States District Court, 450 Golden Gate Avenue, San Francisco, CA. The parties will submit status conference statements to this court in. accordance with Local Rule 235-3 on or before July 2 , 1993 .